Wismettac Asian Foods, Inc. *and* International Brotherhood of Teamsters, Local 630 *and* Rolando Lopez. Cases 21–CA–207463, 21–CA–208128, 21–CA–209337, 21–CA–213978, 21–CA–219153, and 21–CA–212285

July 16, 2021

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On October 14, 2020, the National Labor Relations Board issued a Decision, Order, and Order Remanding in this proceeding.[1] The Board remanded the allegation concerning whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act by issuing Rolando Lopez a verbal counseling record on December 5, 2017. The Board directed the judge to analyze the allegation under the Board's *Wright Line*[2] standard, rather than the four-factor *Atlantic Steel*[3] test pursuant to its recent decision in *General Motors LLC*, 369 NLRB No. 127 (2020). On January 19, 2021, Administrative Law Judge Eleanor Laws issued the attached decision on remand. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order as modified and set forth in full below.[5]

We agree with the judge, for the reasons set forth in her decision, that under *Wright Line,* the Respondent violated Section 8(a)(1) of the Act by issuing Rolando Lopez a verbal counseling record.[6] We further find it unnecessary to pass on the judge's findings that the Respondent's discipline of Lopez should be analyzed, and found unlawful, under the framework established in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

[1] *Wismettac Asian Foods, Inc.*, 370 NLRB No. 35 (2020).

[2] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] 245 NLRB 814, 816 (1979).

[4] The Respondent has excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] Consistent with the complaint allegation that the Respondent violated Sec. 8(a)(1) of the Act by issuing a verbal counseling to Lopez and the Board's prior Order remanding that allegation to the judge, we shall amend the judge's conclusions of law to delete a reference to Sec. 8(a)(3). We have also amended the remedy and modified the judge's recommended Order to conform to the Board's standard remedial language. We have substituted a new notice to conform to the Order as modified.

[6] In adopting the judge's 8(a)(1) finding under *Wright Line* and *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), Members Kaplan and Ring additionally rely on the ample evidence of the Respondent's hostility towards protected activity set forth in the Board's prior decision in this proceeding. They do not rely on the judge's statement concerning whether "[speaking] out aggressively" could be considered misconduct, nor do they rely on fn. 12 of her decision. Finally, for the reasons fully set forth in *General Motors*, they adhere to the view that the *Wright Line* motivation test is the appropriate standard to apply in determining whether an employer has unlawfully disciplined an employee for protected conduct or has acted lawfully in response to unprotected abusive conduct.

For institutional reasons, Chairman McFerran joins her colleagues in affirming the judge's finding of a violation under *Wright Line*. Chairman McFerran was not a Member of the Board when it held in *General Motors* that *Wright Line* applies to allegations concerning discipline for conduct in the course of Sec. 7 activity. However, she dissented from the Board's Notice and Invitation for Briefs in that case, wherein she expressed her grave concerns about the majority's decision to revisit the Board's well-established loss-of-protection standards, including the standard set forth in *Atlantic Steel*, 245 NLRB 814 (1979). *General Motors LLC*, 368 NLRB No. 68, slip op. at 3–6 (2019) (then-Member McFerran, dissenting). Chairman McFerran finds that the instant case illustrates some of her concerns. She observes that, at fn. 12 of her decision, the judge recognized the problems with applying *Wright Line* in certain circumstances previously examined under *Atlantic Steel*, because it could allow an employer to lawfully quell employees from raising protected concerted complaints simply by disciplining all employees for speaking up at meetings or using an elevated voice, thereby "eviscerat[ing]" Sec. 7 rights. Indeed, the awkward application of a *Wright Line* analysis to the facts of this case may have contributed to the judge's consideration of whether the framework set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), would be a better fit.

Chairman McFerran further observes that the majority's apparent need to search for evidence of animus (which clearly exists here) further suggests that the *Wright Line* standard may not be suitable in these circumstances. Prior to the Board's decision in *General Motors*, a violation was established under *Atlantic Steel* by focusing specifically on whether an employee who suffered adverse employment consequences for engaging in what was indisputably protected concerted activity lost the protection of the Act by opprobrious conduct in the course of that activity. Now, the finding of a violation does not focus on whether the employee did anything to lose the protection of the Act, but instead requires the General Counsel to show that the employer's decision to discipline or discharge the employee was motivated by animus toward the employee's protected activity. Consequently, conduct that would typically be protected by the Act would in essence lose the Act's protection absent a showing that the employer harbored animus toward the protected activity. In sum, then, Chairman McFerran questions whether the majority's decision to replace the Board's longstanding loss-of-protection standards with the *Wright Line* standard contravenes the policies of the Act.

AMENDED CONCLUSION OF LAW

Substitute the following for paragraph 1 of the judge's conclusions of law.

By disciplining Rolando Lopez, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully issued Rolando Lopez a verbal counseling record, we shall order the Respondent to rescind the verbal counseling record, to remove from its files all references to the unlawful discipline, and to notify Lopez in writing that this has been done and that the verbal counseling record will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Wismettac Asian Foods, Inc., Santa Fe Springs, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the verbal counseling record issued to Rolando Lopez on December 5, 2017.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful verbal counseling record issued to Rolando Lopez, and within 3 days thereafter, notify him in writing that this has been done and that the verbal counseling record will not be used against him in any way.

(c) Post at its facility in Santa Fe Springs, California, copies of the attached notice marked "Appendix"[7] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 16, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[7] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the verbal counseling record issued to Rolando Lopez on December 5, 2017.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal counseling record issued to Rolando Lopez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the verbal counseling record will not be used against him in any way.

WISMETTAC ASIAN FOODS, INC.

The Board's decision can be found at www.nlrb.gov/case/21-CA-207463 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Elvira T. Pereda, Esq., and *Thomas Rimbach, Esq.,* for the General Counsel.

Scott A. Wilson, Esq., for the Respondent.

Renee Q. Sanchez, Esq., and *Roberto Garcia, Esq.,* for the Charging Party.

DECISION ON REMAND

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Los Angeles, California, on several dates between October 2, 2018, and January 22, 2019. The complaint at issue alleged numerous violations of Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act) surrounding two elections for representation as well as election objections and challenges to certain ballots.

I issued a decision on August 30, 2019, finding several violations of the Act, including the unlawful discipline of employee Rolando Lopez for engaging in protected concerted activity. On October 14, 2020, the Board remanded the following allegation in the above-captioned case: Whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act by issuing Rolando Lopez a verbal counseling record on December 5, 2017. Specifically, the Board stated:

> The complaint alleged, and the judge found, that the Respondent violated Section 8(a)(1) of the Act by issuing Rolando Lopez a verbal counseling on December 5, 2017. In so finding, the judge relied on the four-factor *Atlantic Steel* test in concluding that the Respondent failed to show that Lopez lost the Act's protection when he voiced employees' concerns during a safety meeting. However, after the issuance of the judge's decision, the Board decided *General Motors LLC*, 369 NLRB No. 127 (2020). There, the Board heldthat it would no longer apply the four-factor *Atlantic Steel* test to determine whether employers have unlawfully discharged or otherwise disciplined employees who allegedly engaged in abusive conduct in connection with activity protected by Section 7 of the Act. The Board held that it will now analyze these cases under the Board's *Wright Line* standard, and it decided to apply the standard retroactively to all pending cases. Because the parties have not had an opportunity to address how *Wright Line* applies to this Section 8(a)(1) allegation, we will sever and remand this allegation (set forth in paragraph 7 of the complaint) to the judge for further proceedings consistent with this decision, including reopening the record, if necessary, to allow the parties to introduce evidence relevant to an analysis of the allegation under *Wright Line.*

Wismettac Asian Foods, 370 NLRB No. 35, slip op. at 2 (Footnote omitted).

On October 21, 2020, I issued a Notice to Show Cause, directing the parties to submit statements addressing whether they wished to introduce additional evidence at a videoconference hearing. All parties responded that they did not intend to submit additional evidence. On November 9, I set a briefing schedule with a due date of December 14, which was extended to December 31, 2020. The General Counsel and the Respondent filed briefs, which I have fully reviewed and considered.

FINDINGS OF FACT

The relevant facts, distilled from my original decision, are as

follows.[1]

Wismettac Asian Foods (Wismettac or the Respondent) is a Japanese food distributor. The Company distributes food to restaurants, grocery stores, and wholesalers. Wismettac has a total of 16 branches in the United States, and three in Canada. At the time of the hearing, none of Wismettac's facilities were unionized. The facility in Santa Fe Springs, California (the Los Angeles facility), at issue here, has roughly 135 employees, including warehouse workers, drivers, administrative employees, supervisors and managers. National headquarters for Wismettac resides in offices within the Los Angeles facility.

Anthony "Jose" Vasquez was the warehouse supervisor and later the logistics branch manager, which is also referred to as the plant manager, at the Los Angeles facility. As plant manager, Vasquez supervised all warehouse employees. Vasquez reported to Frank Matheu, the acting deputy general manager.[2] Hikari Konishi was the human resources manager during the relevant time period.

Starting in the Spring of 2017, International Brotherhood of Teamsters, Local 630 (the Union) began actively trying to organize the drivers at the Los Angeles facility. Rolando Lopez, a driver who began working at Wismettac in 2009, was an active part of the employee union committee. The committee members educated themselves about their rights and communicated relevant information about the Union and the organizing drive to their coworkers.

The morning of August 21, 2017, a delegation of about 60 employees, including Lopez, accompanied by two union officials, went to Nishimoto's office to request union recognition. The employees wore union T-shirts and sang union chants. They approached Narimoto with authorization cards and asked him to acknowledge the Union and negotiate a contract. The Respondent declined to voluntarily recognize the Union.

The Union filed an election petition with the National Labor Relations Board (the Board) the afternoon of August 21, 2017. The unit was described as:

> **Included**: All full-time and part-time regular drivers class A, B, C and Leads. All full-time and part-time Warehouse workers and Leads in all departments (all shipping and receiving, All Export depts-State, International, dry, cooler, freezer, all forklift drivers, whse clerks, inventory control, assemblers/selectors, labelers)
>
> **Excluded**: All other employees, office clericals, professional employees, guards, supervisors, and all employment agency workers as defined in the Act.

That same day, the Respondent hired labor consultants Gustavo Flores, Carlos Flores, Ed Hinkle, and David Acosta, to help persuade employees to vote against the Union.

On September 8, 2017, Matheu and Gustavo Flores met with Lopez and his brother Luis Lopez (also a driver for the Respondent), in one of Wismettac's conference rooms.[3] Matheu told them the owner had given him a "green light" to make improvements in the Company, and he would make these changes as long as there was not a third party. When asked what he meant by a third party, Matheu responded that if the Union came in, he could not make improvements or changes. Mr. Flores called the organizing drive revenge and instructed the Lopez' to ask for guarantees from the Union. Matheu reminded the Lopez' that the Respondent's Maryland facility had rejected the Union and encouraged them to do the same.

The parties reached a stipulated election agreement, and on September 19 an election was held for the following unit:

> **INCLUDED**: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.
>
> **EXCLUDED**: All other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.
>
> **Others permitted to vote**: The parties have agreed that GPO Distribution Coordinators, GPO Central Purchase Clerks, central Purchase clerks, and Logistics Office Clerks may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

The Union prevailed, with 75 votes cast for the Union, 21 against, 2 void ballots and 31 challenged ballots. The Respondent refused to sign the tally of ballots and both the Respondent and the Union filed objections. The first election was set aside due to misconduct on the part of a Board Agent.[4] A second election was scheduled to take place on February 6, 2018.

In late November 2017, Vasquez and Jose Romero, a supervisor, approached driver Augustine Troncoso, who was loading his truck. Vasquez told him he needed to fit all his merchandise into his truck for delivery that day. Lopez and his coworker Yader Alvarado proceeded to help Troncoso load his truck. Lopez told

[1] A more detailed statement of facts appears in my original decision with specific citations to the record. This includes the facts to establish jurisdiction, which are hereby incorporated.

[2] Matheu, who is based on Orlando, Florida, oversees 9 of the Respondent's 16 U.S. facilities. He was present at the Los Angeles facility for much of the Union's organizing campaign.

[3] Luis Lopez had been a driver for the Respondent for more than 11 years at the time of the original hearing.

[4] A second election was held on February 6, 2018.

Troncoso that if he was uncomfortable with the merchandise because it was overweight, he was not required to take it. In response to Troncoso expressing his concern about making his first delivery on time, Alvarado told him to worry about his safety first, not the client receiving his merchandise immediately.

Matheu conducted a safety meeting with the roughly 25–30 drivers on December 4. Romero, Vasquez, and Susan Sands, the new assistant operations manager, were also present. One purpose of the meeting was to inform drivers how to use the correct codes when filling out paperwork.

Matheu started the meeting the same way he started all safety meetings with drivers, by reviewing accidents that had occurred at all branches the previous week. He discussed a safety incident at another company, where some merchandise had fallen out of a truck. Lopez asked if he could speak.[5] He relayed, in Spanish, his belief that Vasquez had forced Troncoso to drive an overweight truck. Lopez recounted an incident when he was issued a ticket in 2016 after being forced to drive an overweight truck. There was some back-and-forth between Lopez and Matheu. At one point Matheu told Lopez to lower his voice, and Lopez responded that he was speaking in his normal voice.[6] When Matheu asked Lopez to end the conversation, he complied.

Romero told Lopez there was no reason to bring up an individual case during a safety meeting. Romero said the problem with Troncoso's truck was airbrakes. A driver named Giovani replied that under the laws of California, the problem is not the airbrakes, the problem is the weight and that the company was forcing the drivers to take the merchandise that was overweight. Other drivers also spoke up at the meeting. Lopez did not use any profanity, make threats, or touch anyone.

On December 5, 2017, Vasquez and Romero called Lopez to a meeting and counseled him for his comments at the meeting. Romero faulted Lopez for bringing up an individual case during a safety meeting. The counseling record, dated December 5, stated in full[7]:

> We were discussing our weekly briefing to the drivers. He was using angry hostile tones, was very disrupted during performance. He had nothing positive to contributed (sic), to the meeting, only negative comments toward anything that was said. He was making comments of other drivers (sic) issues that we had, that had nothing to do with the briefing. We also had a guess (sic) speaker that was there and was really frighten (sic) in how he was acting, her name was Susan Sands.[8]

After the counseling had already occurred, Jinna Baik, the employee relations specialist, contacted Sands to investigate. Sands met with Baik on December 8, and she prepared a statement that she turned in on December 11. Lopez' comments at the meeting had been in Spanish, and Sands did not understand him. Sands testified that Lopez ceased speaking after Matheu addressed him. Her statement recounts, in relevant part:

> Frank, ADGM, began the meeting in English, addressing the meeting agenda. A few minutes into the meeting, one of the drivers began speaking Spanish. I do not speak or understand this language therefore I will describe the appearance and demeanor of this driver.
>
> Body language before and during the meeting: the majority of the meeting, his arms cross over his chest. Brandishing his finger at ADGM and ASBM, coupled with an elbow nudge to the driver standing next to him which appeared to me as he was trying to get the other driver to agree with whatever was said. The majority of the meeting, his feet were shoulder width apart with his back slightly arched. Rolling his eyes, smacking his lips and making comments while both ADGM and ASBM were speaking. My opinion the conduct of his body language was unacceptable.
>
> The tone of his voice was aggressive, sarcastic and hostile.
> On 12/08/2017, I was told the drivers name is: Rolando
>
> I've invested a great deal of thought and consideration into the outcome of this meeting. While I want to emphasize that one of the issues described above would not constitute insubordination when viewed singularly, the cumulative effect demonstrates his inability or unwillingness to work as a team, follow protocol, respect for his superiors and the chain of command.
>
> My notation for the record. I was personally distraught by this drivers' (sic) unprofessional behavior.[9]

DECISION AND ANALYSIS

A. Analysis under NLRB v. Burnup and Sims

The remand order instructs me to analyze the allegation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), which I will do. I do not believe, however, that *Wright Line* is the appropriate legal framework under the present facts. The *Wright Line* analysis applies only in so-called "mixed-motive" cases, where it appears that unlawful considerations were a motivating factor in the discipline decision, but where the record supports the potential existence of one or more legitimate justifications for the decision. *Felix Industries*, 331 NLRB 144, 146 (2000), remanded on other grounds 251 F.3d 1051 (D.C. Cir. 2001). By contrast, an employee's discipline independently violates Section 8(a)(1), regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc*., 256 NLRB 965, 976 (1981).

The Board explained in *General Motors* that application of the *Wright Line* standard "presupposes that the employee actually engaged in the misconduct," and stated that nothing in its

[5] Everyone was standing during the meeting.

[6] Alvarado described Lopez' tone of voice as "normal." Matheu described Lopez' tone as very angry and aggressive. Sands described Lopez' tone as hostile and loud. Vasquez described Lopez' voice as loud and aggressive.

[7] R. Lopez did not receive the paperwork about the verbal counseling record at the meeting, and did not know it existed until he requested his personnel file at a later time.

[8] General Counsel Exhibit 3.

[9] Respondent Exhibit 3.

decision should be read as conflicting with *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21 (1964). *General Motors*, slip op. at 10 fn. 27; See also *Nexstar Broadcasting*, 370 NLRB No. 68 (2021). "*Burnup & Sims*, not *Wright Line*, governs where . . . an employer disciplines an employee for allegedly engaging in misconduct during the course of union activity, and the General Counsel contends that the employee did not, in fact, engage in misconduct." *Nexstar Broadcasting*, above, at fn. 1, citing *La-Z-Boy Midwest*, 340 NLRB 80, 80 (2003), enfd. in pertinent part 390 F.3d 1054 (8th Cir. 2004). As detailed below, I find that Lopez was disciplined for his protected concerted activity, and, as the General Counsel contends, he did not engage in misconduct. As such, I believe *Burnup & Sims* provides the correct legal paradigm.

The Supreme Court in *Burnup and* Sims held, "§ 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." 379 U.S. 23. Under the *Burnup and Sims* analysis, the General Counsel has the initial burden to prove the employee was subjected to an adverse employment action for conduct occurring during the course of protected activity. The Respondent must then show it had an honest belief that the employee engaged in serious misconduct. The burden then shifts to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct.[10] *Aqua-Aston Hospitality, LLC*, 365 NLRB No. 53, slip op. at 5 (2017); *Akal Security, Inc*., 354 NLRB 122, 124-125 (2009), reaffd. 355 NLRB 584 (2010); *Taylor Motors*, 365 NLRB No. 21 (2017). "Thus, an employer who disciplines an employee for misconduct within the course of otherwise protected activity will be found to have violated the Act where the evidence discloses that: (a) it did not honestly believe the serious conduct occurred; or (b) even if it did so believe, it was mistaken." *Aqua-Aston Hospitality, LLC*, above, slip op. at 6.

The threshold issue is whether Lopez was disciplined for engaging in protected concerted activity. "To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The facts, detailed above, show that Lopez and at least one other driver voiced previously discussed concerns about carrying overweight loads at a safety meeting Matheu conducted with the drivers. Lopez did not complain alone during the meeting, and the topic, carrying overweight loads, was not an individual concern. I therefore find Lopez engaged in protected concerted activity.[11] There is no dispute that Lopez' discipline was issued because of his conduct at the meeting.

The burden shifts to the Respondent to establish that it held a good-faith belief that Lopez engaged in genuine misconduct. Admittedly, one of the reasons for the discipline was that Lopez made comments concerning another driver's issue "that had nothing to do with the briefing." It is not at all reasonable to construe voicing a concern about driving an overweight truck during a safety meeting, even if it pertains to a fellow employee, as misconduct. Even assuming the Respondent honestly believed this was misconduct, "protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." *Burnup & Sims*, supra at 23.

The Respondent contends that Lopez disrupted the meeting, using angry hostile tones, and making only negative comments. The evidence shows that Lopez asked Matheu if he could speak before he raised the issue of overweight trucks. Though he and Matheu had some back-and-forth, there is no dispute that the exchange between Lopez and Matheu lasted no more than two minutes, and when asked to stop talking, Lopez complied. The only real dispute is whether Lopez' voice was loud and aggressive, as the Respondent contends, or normal, as Lopez and Alvarado contend. I don't find this dispute to be material.[12] Even assuming Lopez raised his voice and spoke out aggressively when discussing his concern about driving with overweight trucks, he did not, under any reasonable view, engage in misconduct. Lopez' comments and behavior were very mild, and they were made in the course of a protected discussion. Lopez did not use any profanity, make threats, act insubordinately, or touch anyone. There is simply no requirement to use a pleasant, happy tone of voice when engaging in protected activity.

[10] This approach protects against indulging the notion that there could be true mixed motives for punishing protected concerted activity that does not, by any reasonable construction, rise to the level of genuine misconduct.

[11] The evidence establishes that Alvarado shared Lopez' concern about overweight loads and spoke out about it shortly before the meeting, and another drivers also complained during the meeting, therefore I do not need to determine whether Lopez acted individually to induce group action. In other words, the activity in this case was not the mere "individual griping" the Board addressed in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019). In any event, as the Board stated in *Meyers II,* supra. at 887, "*Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, *as well as* individual employees bringing truly group complaints to the attention of management. (Emphasis supplied.)

[12] I believe Sands, Vasquez, and Matheu overstated Lopez' tone of voice, and Lopez and Alvarado minimized any negative or loud tone. Lopez, in the course of raising a concern in meeting full of drivers, likely elevated his voice, whether consciously or not. But if speaking in an animated and elevated voice in the course of protected activity, without more, can justify discipline, Section 7 is eviscerated. Herein lies one of the problems with a *Wright Line* analysis under the facts here. To quell employees from raising protected complaints, an employer could discipline all employees for speaking up at meetings, whether they are making a protected complaint or not. Then, it can be argued that the employee disciplined for using the same tone while engaging in protected activity is being treated the same as other employees, so there is no causal connection. That surely isn't consistent with the Act.

Finally, the Respondent claimed that Lopez was disciplined because he frightened Sands. I do not find this was an honestly held belief. Sands, who was solicited for a statement after the discipline had already occurred, never said she was frightened in either her statement or her testimony. This is not surprising, as she could not understand what Lopez was saying because he was speaking in Spanish, he was speaking to Matheu, he did not scream or yell, and he made no threats or outbursts.[13] Interestingly, Sands said she thought Lopez was being sarcastic even though she could not understand what he was saying, yet the counseling record, signed by supervisors who speak Spanish, did not mention sarcasm. Simply put, the verbal counseling and the verbal counseling record were drummed up to discipline union supporter Lopez, in the height of the union campaign, for engaging in protected concerted activity. There was no honest belief of misconduct.

Based on the foregoing, I find the Respondent failed to establish that it disciplined Lopez based on an honestly held belief that he had engaged in misconduct in the course of protected activity. As such, I find his verbal counseling record violated the Act.

B. Analysis under Wright Line

Under *Wright Line*, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that Lopez' protected activity was a motivating factor in the decision to issue the warning. The elements commonly required to support the General Counsel's initial burden as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. The evidence of animus or hostility must be sufficient to establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 6–8 (2019).

As detailed above, Lopez engaged in protected concerted activity, about which the Respondent was aware.

The next step is to determine whether the Respondent harbored animus against protected activity sufficient to establish a causal relationship between the employee's protected activity and/or union activity and the employer's adverse action against the employee. As set forth above, Lopez was disciplined for the protected activity he engaged in, i.e. making comments concerning another driver's issue with overweight loads during a safety meeting. Supervisor Romero called him out at the meeting for raising this "individual" issue, it was discussed at the counseling the next day, and it appeared on the verbal counseling record. This is more than sufficient to show animus toward Lopez' protected concerted activity.[14] Accordingly, the General Counsel has met her initial *Wright Line* burden.

The burden now shifts to the Respondent "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, or that it could have taken the action, but must persuade by a preponderance of the evidence that the action would have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989); *Structural Composites Industries*, 304 NLRB 729, 730 (1991).

Where the General Counsel makes a strong showing of discriminatory motivation, the employer's defense burden is substantial. See, e.g., *Bally's Park Place, Inc*., 355 NLRB 1319, 1321 (2010) (reversing judge and finding violation because judge "did not consider the strength of the General Counsel's case in finding that the Respondent met its *Wright Line* rebuttal burden"), enfd. 646 F.3d 929 (D.C. Cir. 2011); *East End Bus Lines*, supra. Given the strong direct evidence that Lopez was disciplined for engaging in the protected activity of voicing drivers' safety issues at a safety meeting, I find this is such a case.

The Respondent contends that Lopez "crossed the line" by disrupting the meeting even though he was told his issue would be addressed at the conclusion of the meeting, and by being aggressive and sarcastic. For the reasons set forth above, in the *Burnup and Sims* analysis regarding whether the employer had an honest belief misconduct occurred, I find this explanation is pretext to mask discriminatory motivation.

Moreover, the Respondent did not come forward with any evidence of comparative employees who were issued a verbal counseling for similar conduct. In addition, certain aspects of Sands' statement are evidence of pretext.[15] She stated that "one of the issues described above would not constitute insubordination when viewed singularly, the cumulative effect demonstrates his inability or unwillingness to work as a team, follow protocol, respect for his superiors and the chain of command." Yet, Lopez' conduct took place over less than two minutes, and when he was asked to stop speaking, he did. Sands seems to be faulting Lopez for the "cumulative effect" of how he was standing and certain behaviors such as smacking his lips, "brandishing" his finger, and nudging another driver. She had never met Lopez before, so she had no idea how he usually stood, whether he smacked his lips when he spoke, or how he normally spoke in general. In this regard, Lopez' stance and facial/bodily movements were not included in the record of verbal counseling. Finally, the *post hoc* solicitation of Sands' statement, days after the discipline had occurred, is suspicious.

In sum, analyzed under *Wright Line*, the General Counsel met her burden to establish the Respondent violated Section 8(a)(1).

CONCLUSIONS OF LAW

By disciplining Rolando Lopez, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

The unfair labor practice committed by Respondent affects commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the

[13] At most he raised his voice for a short exchange.

[14] There was also significant evidence of animus for employees' (including Lopez') union activity, as set forth in my original decision.

[15] Because it was issued after the discipline, Sands' statement obviously couldn't have served as a basis for it. Its relevance is limited to pretext.

policies of the Act.

Having unlawfully issued Rolando Lopez a verbal counseling record the Respondent shall be ordered to rescind remove from its files all references to this discipline and notify him in writing that this has been done and the discipline will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Wismettac Asian Foods, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining employees because they engage in protected concerted activities and to discourage employees from engaging in these activities.

(b) In any other manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative actions:

(a) Within 14 days of the Board's Order remove from their files all references to the verbal counseling record issued to Rolando Lopez on about December 5, 2017 and notify him in writing that this has been done and that this discipline will not be used against him in any way.

(b) Post at its facility in Santa Fe Springs, California, copies of the attached notice marked "Appendix" in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 2017.[17]

(c) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 19, 2021

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT discipline employees because they engage in protected concerted activities

WE WILL, within 14 days of the Board's Order, remove from our files file any references to the verbal counseling record issued to Rolando Lopez on December 5, 2017, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that this discipline will not be used against him in any way.

WISMETTAC ASIAN FOODS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-207463 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.